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THE DISTRICT OF COLUMBIA
BEFORE
THE OFFICE OF EMPLOYEE APPEALS

In the Matter of:)	
)	
LATASHA VERDINER,)	
Employee)	OEA Matter No. 1601-0178-11
)	
v.)	Date of Issuance: July 17, 2014
)	
DISTRICT OF COLUMBIA)	
PUBLIC SCHOOLS,)	
Agency)	STEPHANIE N. HARRIS, Esq.
)	Administrative Judge
Stephen White, Employee Representative		
Sara White, Esq., Agency's Representative		

INITIAL DECISION ON REMAND

INTRODUCTION AND PROCEDURAL BACKGROUND

On August 18, 2011, Latasha Verdiner ("Employee") filed a Petition for Appeal with the Office of Employee Appeals ("OEA" or "Office") contesting the District of Columbia Public Schools' ("Agency") decision to terminate her from her position as an Educational Aide at Shaed Elementary School ("Shaed") effective July 29, 2011. Employee was terminated for receiving an 'Ineffective' rating under the IMPACT Performance Assessment System for the 2010-2011 school year. On September 19, 2011, Agency submitted its Answer to Employee's Petition for Appeal.

I was assigned this matter in June 2013. Thereafter, I issued an Order dated July 17, 2013, requiring the parties to attend a Prehearing Conference on August 20, 2013. Both parties were in attendance for the Prehearing Conference. On January 23, 2014, the undersigned issued a Post Prehearing Conference Order wherein the parties were required to submit briefs addressing the issues raised during the Prehearing Conference. Agency's brief was due on February 21, 2014, and Employee's brief was due on March 21, 2014. An Amended Post Prehearing Conference Order was issued on January 30, 2014, which revised the deadlines with Agency's brief being due on February 28, 2014, and Employee's brief being due on March 28, 2014.

On March 6, 2014, the undersigned granted Agency's request for an extension of time and the deadlines were revised to reflect the new briefing schedule. Agency timely submitted its brief on March 6, 2014. On April 17, 2014, the undersigned granted Employee's request for an extension of time, resulting in Employee's brief being due on or before May 2, 2014. On May 8, 2014, the undersigned issued an Order for Statement of Good Cause, wherein Employee was ordered to explain her failure to submit her brief by the required deadline. On May 20, 2014, Employee's Representative submitted a Statement of Good Cause and the corresponding brief, which was accepted by the undersigned.

Upon further review of the record, the undersigned issued an Order on June 11, 2014, requiring Agency to submit a brief and additional documentation in this matter concerning Employee's collective bargaining unit. Agency submitted its brief on June 30, 2014. All the required briefs have been submitted in this matter. After considering the parties arguments as presented in their submissions to this Office, the undersigned has determined that there are no material facts in dispute, and as such, an Evidentiary Hearing is not required. The record is now closed.

JURISDICTION

The Office has jurisdiction in this matter pursuant to D.C. Official Code § 1-606.03 (2001).

ISSUE

Whether Agency's action of separating Employee from service pursuant to receiving an "Ineffective" performance rating under the IMPACT system was done in accordance with all applicable laws, rules, or regulations.

BURDEN OF PROOF

OEA Rule 628.1, 59 DCR 2129 (March 16, 2012) states:

The burden of proof with regard to material issues of fact shall be by a preponderance of the evidence. "Preponderance of the evidence" shall mean:

That degree of relevant evidence which a reasonable mind, considering the record as a whole, would accept as sufficient to find a contested fact more probably true than untrue.

OEA Rule 628.2 *id.* states:

The Employee shall have the burden of proof as to issues of jurisdiction, including timeliness of filing. The Agency shall have the burden of proof as to all other issues.

ANALYSIS AND CONCLUSIONS OF LAW

The following findings of facts, analysis, and conclusions of law are based on the documentary evidence presented by the parties during the course of Employee's appeal process with OEA. D.C. Official Code § 1-606.03 (2001) gives this Office the authority to review, *inter alia*, appeals from separations pursuant to a performance rating.

Employee's Position

In her Petition for Appeal, Employee claims that her IMPACT assessment was rated unfairly because she did not receive an observation during the school year. She contends that her scores, specifically the score for Instructional Support and Commitment to the School Community component, did not reflect her positive rapport with students and families or activities, including her attendance at open houses, assemblies and fundraisers. Employee also provided arguments regarding scoring areas where she believed that she should have received a higher score.¹

In her brief, Employee contests that she was observed two times, but acknowledges that she was observed once, however she claims it was a "pop-up" evaluation. She further states that she is covered by AFSCME Local 2921's Collective Bargaining Agreement ("CBA"). Additionally, Employee relays that there is no record with her Union, AFSCME, that a grievance was filed on her behalf and Agency has failed to provide any documentation to support its allegation that Employee filed a grievance.²

Agency's Position

In its Answer and brief, Agency asserts that in 2005, pursuant to the DC Omnibus Authorization Act, PL 109-356 (D.C. Code §1-617.18), DCPS was granted authority to develop its own evaluation process and tool for evaluating its employees.³ Agency relays that IMPACT is the evaluation tool used for the 2010-2011 school year to rate the performance of school-based personnel.

Agency argues that Employee's termination was done in accordance with all applicable laws and regulations. Agency states that Employee's IMPACT scores reflect appropriate and informed assessments of her performance as an Educational Aide for the 2010-2011 school year. According to Agency, Employee received a final IMPACT rating of "Ineffective" under the IMPACT rating system thus warranting her termination. Additionally, Agency denies that Employee was not rated fairly and asserts that it followed the same procedures for evaluating each Group 17 Educational Aide.⁴

Agency asserts that Employee was assessed during Cycles 1 and 3 for the 2010-2011 school year. Agency explains that educational aides received holistic evaluations over the course

¹ See Petition for Appeal (August 18, 2011).

² See Employee Brief (May 20, 2014).

³ See Agency Answer (September 19, 2011). See also Agency Brief (March 6, 2014).

⁴ *Id.*

of the cycle, where all the work that they performed over the course of the cycle was evaluated and assessed. Principals and administrators performing evaluations for educational aides were not required to observe aides in the classroom setting.⁵

Initially, Agency stated that Employee was a member of the Council of School Officers (“CSO”).⁶ However, Agency subsequently stated that it inadvertently stated that Employee was a member of CSO, and that at the time of her termination, Employee was a member of AFSCME 2912. Agency notes that the CBA between AFSCME and DCPS is silent with respect to the evaluation process of performance evaluations.⁷

Governing Authority

DCMR §§1306.4, 1306.5 gives the Superintendent authority to set procedures for evaluating Agency’s employees.⁸ The above-referenced DCMR sections provide that each employee shall be evaluated each semester by an appropriate supervisor and rated annually prior to the end of the year, based on procedures established by the Superintendent. 5 DCMR 1401 provides as follows:

1401.1: Adverse action shall be taken for grounds that will promote the efficiency and discipline of the service and shall not be arbitrary or capricious.

1401.2: For purposes of this section, “just cause for adverse action” may include, but is not necessarily limited to, one (1) or more of the following grounds:

(c) Incompetence, including either inability or failure to perform satisfactorily the duties of the position of employment.

Accordingly, in reviewing this matter, the undersigned will address whether Agency followed the procedures it developed in evaluating its employees; and whether or not Agency’s termination of Employee pursuant to her IMPACT rating was supported by just cause. As referenced above, ‘just cause’ for adverse actions includes incompetence – an employee’s inability or failure to perform satisfactorily the duties of their position of employment. Additionally, based on statements by both Employee and Agency, the undersigned finds that Employee is a member of the AFSCME bargaining unit.⁹

⁵ See Agency Brief (March 6, 2014).

⁶ *Id.*

⁷ See Agency Brief (June 30, 2014).

⁸ DCMR § 1306 provides in pertinent parts as follows:

1306.1 - Official performance evaluation ratings for all employees of the Board of Education shall be inclusive of work performed through June 30th, unless otherwise specified in this section.

1306.5 – The Superintendent shall develop procedures for the evaluation of employees in the B schedule, EG schedule, and ET 2 through 5, except as provided in § 1306.3

⁹ See Employee Brief, pp. 2-3 (May 20, 2014); Agency Brief, p. 2 (June 30, 2014).

The IMPACT Process

Agency relays that it conducts annual performance evaluations for all its employees and utilized IMPACT as its evaluation system for all school-based employees during the 2010-2011 school year. With the IMPACT system, all staff received written feedback regarding their evaluations, as well as a post-evaluation conference with their evaluators. IMPACT evaluations and ratings for each assessment cycle were available online for employees to review by 12:01 a.m., the day after the end of each cycle. For the 2010-2011 school year, if employees had any issues or concerns about their IMPACT evaluation and rating, they were encouraged to contact DCPS' IMPACT team by telephone or email. At the close of the school year, all employees received an email indicating that their final scores were available online. Additionally, a hard copy of the report was mailed to the employees' home address on file.¹⁰

According to Agency, prior to instituting IMPACT, all principals and assistant principals at DCPS were provided with training materials, which they then used to conduct a full-day training with all staff members in September 2010. The training detailed the IMPACT process, the components and rubrics for each group, consequences, and positive and negatives associated with each final IMPACT rating. Each staff member was provided with a full IMPACT guidebook unique to their evaluation group. The guidebooks were delivered to the employees' schools and were also available online via the DCPS website. Throughout the year, the IMPACT team visited schools to answer questions as well as to ensure that the IMPACT hotline was available to all staff members via email and/or telephone to answer questions and provide clarification.¹¹

Employee was an Educational Aide for the 2010-2011 school year, which was designated within Group 17 for the IMPACT evaluation. Each assessment group includes multiple components, each of which has a unique scoring rubric that outlines clear performance expectations. A designated Administrator assesses each employee formally two times during the year. As part of each assessment cycle, employees meet with the Administrator during a conference, where feedback about the IMPACT rubric are given and steps for professional growth are discussed.¹²

Agency asserts that pursuant to the IMPACT procedure, Employee was assessed during Cycles 1 and 3 for the 2010-2011 school year. Specifically, Agency submits that Employee received the following assessments:

1. 2010-2011 Cycle 1 Assessment and Conference completed on November 30, 2010 (deadline December 1st);¹³
2. 2010-2011 Cycle 3 Assessment and Conference completed on May 12, 2011 (deadline June 15th).¹⁴

¹⁰ Agency Brief, p.2 (March 6, 2014).

¹¹ *Id.*

¹² Agency Brief, Exhibit 1, p. 8 (March 6, 2014).

¹³ Agency Answer, Tab 3 (September 19, 2011).

¹⁴ *Id.*, Tab 4.

For the 2010-2011 school year, the IMPACT process for Group 17 employees consisted of two (2) assessment cycles: the first assessment cycle (“Cycle 1”), which ended on or around December 1st and the second assessment cycle (“Cycle 3”) which ended on or around June 15th.¹⁵ Group 17 employees were assessed on a total of three (3) IMPACT components, for the 2010-2011 school years, namely:

- 1) Educational Aide Standards (EA) – comprised of 85% of Group 17 employees’ scores;
- 2) Commitment to the School Community (CSC) – 17% of Group 17 employees’ scores;
- 3) School Value-Added (SVA) – 5% of Group 17 employees’ scores;
- 4) Core Professionalism – This component is scored differently from the others, and there is only a deduction if you receive a Slightly Below Standard rating. This is a measure of four (4) basic professional requirements for all school-based personnel. These requirements are as follows:
 - 1) Attendance;
 - 2) On-time arrival;
 - 3) Compliance with policies and procedures; and
 - 4) Interacting with colleagues, students, families, and community members in a respect manner.

School-based personnel assessed through IMPACT, ultimately received a final IMPACT score at the end of the school year of either:¹⁶

- 1) Ineffective = 100-174 points (subject to immediate separation from school);
- 2) Minimally Effective = 175-249 points;
- 3) Effective = 250-349 points; and
- 4) Highly Effective = 350-400 points.

Analysis

Chapter 5-E of District of Columbia Municipal Regulation (“DCMR”) §§1306.4, 1306.5 gives the Superintendent the authority to set procedures for evaluating Agency’s employees. Additionally, 5-E DCMR §§1306.6, 1306.8 requires that each performance rating plan provide ratings ranging from outstanding performance to unsatisfactory performance, with a right to appeal a below average or unsatisfactory rating.¹⁷ The above-referenced DCMR sections provide that each employee shall be evaluated by an appropriate supervisor and rated annually prior to the end of the year, based on procedures established by the Superintendent. In the instant matter, the IMPACT process detailed above is the evaluation procedure put in place by Agency for the 2010-2011 school year. Employee was evaluated by a designated Administrator, Principal

¹⁵ Agency Brief, Exhibit 1, pp. 6-7 (March 6, 2014)

¹⁶ Agency Answer, Tab 2 (September 19, 2011).

¹⁷ The undersigned finds that the IMPACT scale corresponds to the 5-E DCMR §1306.6 as follows: IMPACT Highly Effective = outstanding and above average performance; IMPACT Effective = average performance; IMPACT Minimally Effective = below average performance; and IMPACT Ineffective = unsatisfactory performance.

Cheryl Taylor. Employee received a final evaluation on the above specified components at the end of the school year, wherein, she received an “Ineffective” IMPACT rating. The record shows that Employee received two assessments and corresponding conferences during the 2010-2011 school year.¹⁸ Employee acknowledges that she was observed two times, but argues that they were not conducted properly.

The guidelines provided for IMPACT require Agency to perform two assessments and corresponding conferences to discuss the IMPACT scores. Each assessment cycle required an evaluation of the EA, CSC, and CP component, along with an overall SVA score. Based on the guidelines provided by the IMPACT guidebook, the undersigned finds that Agency properly followed the IMPACT evaluation process. The record shows that Principal Taylor held two conferences with Employee on November 30, 2010, and May 12, 2011, respectively.¹⁹ Additionally, Employee’s written assessments for Cycles 1 and 3, show that she was rated in the required EA, CSC, CP, and SVA rubric components.

While Employee argues that Agency did not follow proper procedures and she was never observed in person, the IMPACT guidelines did not require Agency to conduct a formal observation of Employee, only a formal assessment to be given during a conference with the assigned Administrator. Employee does not allege that she did not have the required conferences or assessments. Moreover, Employee has not alleged that Agency did not adhere to the IMPACT process. Accordingly, I find that Agency properly conducted the IMPACT process and had just cause to terminate Employee after she was rated “Ineffective” for the 2010-2011 school year.

While Employee has provided arguments regarding scoring areas where she believed that she should have received a higher score, Employee’s arguments do not specifically dispute that the comments in her IMPACT evaluation were untrue, nor did she provide any evidence that directly contradicted the Principal’s findings in her evaluation. Further, Employee has provided no documentation to support her arguments that she should have received a higher score. Additionally, while Employee disputes the subtractions given in the Core Professionalism category due to attendance and tardiness issues, the undersigned finds that Employee’s arguments that she had 95% attendance and endured traffic due to residing in Virginia unpersuasive. Thus, the undersigned finds that none of the arguments and evidence presented by Employee successfully contradicts any of the findings in her IMPACT evaluation.

Moreover, the D.C. Superior court in *Shaibu v. District of Columbia Public Schools*²⁰ explained that, substantial evidence for a positive evaluation does not establish a lack of substantial evidence for a negative evaluation. This court noted that, “it would not be enough for [Employee] to proffer to OEA evidence that did not conflict with the factual basis of the [Principal’s] evaluation but that would support a better overall evaluation.”²¹ The court further opined that if the factual basis of the “Principal’s evaluation were true, the evaluation was supported by substantial evidence.” Additionally, it highlighted that “principals enjoy near total

¹⁸ Agency Answer, Tabs 3, 4 (September 19, 2011).

¹⁹ Agency Answer, Tabs 3, 4 (September 19, 2011).

²⁰ Case No. 2012 CA 003606 P (January 29, 2013).

²¹ *Id.* at 6.

discretion in ranking their teachers”²² when implementing performance evaluations. The court concluded that since the “factual statements were far more specific than [the employee’s] characterization suggests, and none of the evidence proffered to OEA by [the employee] directly controverted [the principal’s] specific factual bases for his evaluation of [the employee]...” the employee’s petition was denied.

In the instant matter, Employee has not proffered to this Office any credible evidence that controverts any of the Principal’s comments. Instead, Employee made general statements in her rebuttals and explanations to the Principal’s comments. For example, Employee attempted to justify her subtractions for Core Professionalism with arguments that she resided in VA and had to endure traffic. However, this Office has consistently held that the primary responsibility for managing and disciplining Agency’s work force is a matter entrusted to the Agency, not to OEA.²³ As performance evaluations are “subjective and individualized in nature,”²⁴ this Office will not substitute its judgment for that of an agency; rather, this Office limits its review to determining if “managerial discretion has been legitimately invoked and properly exercised.”²⁵ Thus, I find that as her direct supervisor, it was within the Principal’s discretion to rank and rate Employee’s performance. Moreover, OEA is not in the position to recommend that Employee receives a higher rating as this is Agency’s role in performance evaluations.

Based on the foregoing, I find that Agency had sufficient ‘just cause’ to terminate Employee, after she received an ‘Ineffective’ performance evaluation under IMPACT.

ORDER

Based on the foregoing, it is hereby **ORDERED** that Agency’s action of removing Employee is **UPHELD**.

FOR THE OFFICE:

STEPHANIE N. HARRIS, Esq.
Administrative Judge

²² *Id. Citing Washington Teachers' Union, Local # 6 v. Board of Education*, 109 F.3d 774, 780 (D.C. Cir. 1997).

²³ *See Mavins v. District Department of Transportation*, OEA Matter No. 1601-0202-09, *Opinion and Order on Petition for Review* (March 19, 2013); *Mills v. District Department of Public Works*, OEA Matter No. 1601-0009-09, *Opinion and Order on Petition for Review* (December 12, 2011); *Washington Teachers' Union Local No. 6, American Federation of Teachers, AFL-CIO v. Board of Education of the District of Columbia*, 109 F.3d 774 (D.C. Cir. 1997); *see also Huntley v. Metropolitan Police Department*, OEA Matter No. 1601-0111-91, *Opinion and Order on Petition for Review* (March 18, 1994); and *Hutchinson v. District of Columbia Fire Department*, OEA Matter No. 1601-0119-90, *Opinion and Order on Petition for Review* (July 2, 1994).

²⁴ *See also American Federation of Government Employees, AFL-CIO v. Office of Personnel Management*, 821 F.2d 761, 765 (D.C. Cir. 1987) (noting that the federal government has long employed the use of subjective performance evaluations to help make RIF decisions).

²⁵ *See Stokes v. District of Columbia*, 502 A.2d 1006, 1009 (D.C. 1985).